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MISSOULA, MT

2007 JUN 8 AM 10 20

PATRICK R. DUFFY
BY _____

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

PEDRO RIVERA, a/k/a DENNIS)	
GONZALES,)	CV 05-165-M-DWM-JCL
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
DON BELL,)	
)	
Defendant.)	
)	

United States Magistrate Judge Jeremiah C. Lynch entered Findings and Recommendations in this matter on May 8, 2007. The parties did not timely object and so have waived the right to de novo review of the record. 28 U.S.C. § 636(b)(1). This Court will review the Findings and Recommendation for clear error.

McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000).

Plaintiff Rivera brings this case under 42 U.S.C. § 1983 alleging that Defendant Bell, a tribal police officer, used excessive force in arresting him in violation of the Fourth

Amendment. The Complaint alleges that Bell physically abused Rivera while the latter was handcuffed, and that Bell falsely reported that Rivera threatened him during the arrest. Defendant Bell has filed a motion to dismiss the Complaint (Doc. No. 12).

Judge Lynch recommends dismissal of the claim that Bell falsely reported a threat by Rivera, based on attachments filed by Rivera that concede that he threatened Bell during the arrest. Judge Lynch rejects Bell's remaining arguments for dismissal, including Bell's claim that he is not a state actor for purposes of the suit; Bell's arguments relating to official and individual capacity and the scope of his employment; claimed immunity based on a Memorandum of Agreement between the State and the Tribes; and Bell's argument that the Plaintiff has failed to join an indispensable party. On the basis of his findings Judge Lynch recommends that the motion to dismiss be denied except as it relates to the claim that Bell filed a false report.

I can find no clear error with Judge Lynch's Findings and Recommendations and therefore adopt them in full.

Accordingly, IT IS HEREBY ORDERED that Defendant Bell's Motion to Dismiss the Complaint (Doc. No. 12) is GRANTED as to the Plaintiff's claim that Defendant Bell falsely reported that Plaintiff threatened him and DENIED in all other respects.

DATED this 7 day of June, 2007.


Donald W. Molloy, Chief Judge
United States District Court